



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 01 201 52032 Office: CALIFORNIA SERVICE CENTER

Date: FEB 27 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

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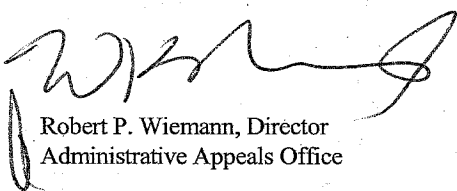
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in December of 1995. It is engaged in the import and export of electronic goods. It seeks to employ the beneficiary as its president. Accordingly, it endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the record did not demonstrate that the beneficiary's duties had been or would be primarily managerial or executive in nature.

On appeal, counsel for the petitioner asserts that the beneficiary qualifies for this visa classification under the concept of "functional management."

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary has been and will be employed in a managerial or executive capacity for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially provided the beneficiary's duties as follows:

Her duties and responsibilities included acting as the vital link in serving the customers in the United States and to coordinate with the parent operation to assure the quality and timeliness of all shipments. In addition, she is responsible for the continuing development of the United States Market and report [sic] to the home office as to current market trend and latest innovation on the cutting edge technology in electronic products, to allow the production department adequate lead time for products development.

The petitioner also stated that the beneficiary was the only person left in the United States to manage the vital functions of marketing and customer services in connection with the international transactions between the two countries.

The director requested additional evidence including a description of the beneficiary's day-to-day duties, the petitioner's organizational chart with a description for all employees under the beneficiary's supervision, and the petitioner's California Form DE-6, Quarterly Wage Report.

In response, the petitioner stated through its counsel that the beneficiary was the person in charge of all the operations of the petitioner. The petitioner also stated that it was the sales and marketing arm of the overseas parent company and that its major function in the United States was sales, marketing, and customer service. The petitioner also provided a description of the beneficiary's job function as follows:

1. To direct and manage overall sales activities of the USA branch;
2. To hire/fire and review performance of employees and assign proper jobs;
3. To be authorized to sign on behalf of US entity, all checks, notes and other evidence of obligation on behalf of the Corp.
4. To negotiate and sing [sic] up sales contracts;
5. To determine major import/export items and review development progress;
6. To review and approve shipping routes, schedules and priorities;

7. To do quality control on all import/export items;
8. To make arrangements with local and overseas port of entries;
9. To develop marketing strategies and plans through tradeshow events, exhibitions and other sales campaigns
10. To discuss about complex situation to the parent company on as-need basis.

The petitioner also provided its California DE-6 Form for the quarter in which the petition was filed. The DE-6 Form reflected that the petitioner employed two individuals neither of which were the beneficiary. The petitioner's organizational chart depicted the beneficiary as president, a warehouse manager, a salesperson, a business assistant, and two additional "salespeople to be retained."

The director determined that the petitioner would be acting in the capacity of a first-line supervisor and that it would be unreasonable to believe that the beneficiary would not be involved with the day-to-day non-supervisory duties that are commonplace in the industry. The director concluded that the petitioner had not shown that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary is not a first-line supervisor but is instead responsible for the entire organization. Counsel also asserts that the beneficiary is qualified for this classification under the concept of functional management. Counsel also submits a letter from the chairman of the board of the petitioner that indicates that the beneficiary is overseeing the petitioner's operations.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner's description of the beneficiary's duties confirms that the beneficiary is involved in the day-to-day operational functions of the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner must demonstrate that the beneficiary not only has the requisite authority, but also that a majority of her duties relate to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. The petitioner's position descriptions for the two employees under the beneficiary's supervision at the time of filing the petition does not indicate that either of these individuals engages in market research, negotiates sales contracts, engages in quality control, or makes arrangements with

local and overseas ports of entry. The beneficiary is primarily responsible for these activities, in addition to her responsibilities as a first-line supervisor to a warehouse employee and a salesperson.

In addition, the record presents confusing evidence regarding the current employment of the beneficiary. Although the petitioner notes that its parent company was paying the beneficiary's salary, it appears that the beneficiary is providing services to the petitioner. The petitioner's organizational chart depicts the beneficiary as the president with direct supervision over three employees. Yet the petitioner submits independent evidence that it employed two individuals, not three or four. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. Moreover, contrary to counsel's contention that the beneficiary is not a first-line supervisor, the organizational chart depicts the beneficiary supervising three employees. The employees supervised by the beneficiary are not shown to supervise or manage other individuals. Thus, the beneficiary, according to the organizational chart is a first-line supervisor. As confirmed by counsel the employees are not professionals, managers, or supervisors.

Further, counsel's contention that the beneficiary qualifies as a functional manager because she oversees all operations of the petitioner is not persuasive. Again, the petitioner is primarily performing the operational tasks associated with the primary function of the petitioner, that is marketing, sales, customer relations.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are indicative of an individual performing the operational tasks necessary to conduct the day-to-day business of the enterprise. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Although the director based her decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a six-year-old trading company that claimed to have a gross annual income of \$1,413,394. The firm employed a warehouse manager and a salesperson. The beneficiary, although not directly employed by the petitioner, provided her services as president. It is not possible to determine that the petitioner's three employees could serve the reasonable needs of the petitioner without the beneficiary contributing to the performance of a majority of the operational tasks of the company. It is not possible to determine from the record that the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one fact in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage of \$36,000 per year.

8 C.F.R § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the fiscal year beginning October 1, 2000 and ending September 30, 2001 reveals a total net income of negative \$76,758. In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income

tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D. N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D. N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084.

In addition, the petitioner has not previously paid the beneficiary a salary providing a basis for contending that it could pay the proffered wage. Further, the petitioner's submission of its bank statements cannot establish the petitioner's ability to pay the proffered wage. Bank statements do not provide information regarding the petitioner's accounts payable and what funds are actually available for the payment of salaries.

The petitioner has not established its ability to pay the proffered wage. For this additional reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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